No. 12395

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUIS PARKER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

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TABLE OF CONTENTS

TABLE OF CASES

SUMMARY STATEMENT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging that the defendant did knowingly receive and conceal a quantity of narcotic drugs, to-wit: 204 grains of opium prepared for smoking and 75 grains of Yen Shee, knowing the same to have been imported into the United States contrary to law and in violation of Section 174, Title 21, U.S.C.

On the 12th day of August, 1949, the defendant was sentenced to a Federal prison camp for a period of ten months.

Prior to the trial and on April 21, 1949, the defendant moved to suppress evidence secured in his residence at the time of the arrest (R. pp. 4-5) supported by his verified petition (R. pp. 5-6) and prayed that the evidence be excluded from the trial of the action and returned to him. The arrest was made without warrant and no warrant for search of the defendant's residence was secured. The circumstances claimed to justify the arrest are set forth in the affidavits of the arresting officers (R. pp. 8 to 16) showing that they were not previously acquainted with the defendant but acting on an anonymous phone call, entered the defendant's apartment, opened the front door which was unlocked but closed, entered another door which was ajar and

a third door which was closed, found the defendant and, on search of the apartment, discovered opium smoking outfit and the opium and Yen Shee mentioned in the indictment. The affidavits of the defendant and Lottie Morgan and Robert D. Lee (R. pp 16 to 20) are to the effect that the outside door was locked.

The motion to suppress and return evidence was made at the commencement of the trial (R. p. 72) and motion for new trial was timely made following judgment of the Court (R. p. 48)

JURISDICTION

Violations of the above statute are cognizable only by United States District Courts, which have exclusive jurisdiction of crimes and offenses cognizable under the authority of the United States. The jurisdiction of the Court below was invoked under the following statutes:

Section 546, Title 18, U.S.C.A.
Section 41-2, Title 28, U.S.C.A.
Section 371, Title 28, U.S.C.A.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 225, Title 28, U.S.C.A.

STATEMENT OF QUESTIONS RAISED

The only question raised by this appeal is as to the validity of the arrest of the defendant, the search of his residence and the seizure of the evidence listed in the indictment.

SPECIFICATIONS OF ERROR

No. 1: The District Court erred in overruling the defendant's motion to suppress and return evidence (R. pp. 4-5).

No. 2: The District Court erred in overruling the defendant's motion made at the commencement of the trial to suppress and return evidence (R. p. 72).

No. 3: The District Court erred in overruling the defendant's motion timely made for a new trial. (R. p. 48).

ARGUMENT

Specifications of Error 1, 2, and 3

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

—Article IV, Amendments, Constitution of the United States.

As all specifications of error deal with the single question as above stated, to-wit: the validity of the arrest, search and seizure, in the interest of time and space economy, the three specifications of error will be argued as one.

On the 24th day of November, 1948, between 9 and 9:30 P. M., (R. p. 86) Robert W. Morris was on duty as supervising Captain of the night shift and captain of the felony squad of the Seattle Police Department. He had been with the department for seventeen years. At about the time mentioned, according to his testimony, he recevied an anonymous telephone call advising him that a man was at 1219½ Yesler Way, Seattle, Washington in Apartment B who "looked like he was poisoned, in bad shape, and somebody better get up there in a hurry. I tried to find out who the man was or where he was. He wouldn't tell me. He said 'you

get up here and I will be here.' " (R. pp 74-75, 90). Stating that he had a call for another case requiring an entire squad and as 12th and Yesler was not too far out of the way, he directed officers Zuarri, Waitt, Musselman and Ivy to meet at 12th and Yesler immediately. (R. p. 93). The officers left in three police cars (R. p. 97). Officers Zuarri and Waitt arrived around 9:15 o'clock and found Capt. Morris already at the designated corner waiting for them. The other car arrived a few minutes later (R. p. 109, possibly five minutes or more later, R. p. 118). They found the street door of the designated address closed but not locked. Capt. Morris directed two of the officers to wait outside (R. pp. 78-9) and two of the officers accompanied Morris, opened the outside door and climbed the stairs leading to Apartment B. "I told Waitt and Musselman to come with me and the others to stay outside. I told them that until we found out what it was all about, so we didn't look like a bunch of policemen climbing the stairs." (R. p. 78). They came to Apartment B, the residence of the defendant (R. p. 186) and noticed that the door was ajar (R. p. 95). They called out: "I didn't want to get shot" according to Capt. Morris (R. p. 96). They entered the defendant's apartment without having any idea that narcotics would be discovered in the room (R. p. 98), and under the belief that "someone was in bad shape, that they were sick and needed police help or assistance" (R. p.

77). They entered the apartment and saw another inside door closed, which they opened and discovered the defendant with exhibit 1 beside him and in a groggy but cooperative condition. (R. pp. 96, 97). The defendant was lying on his bed. (R. p. 80). They thereupon placed him under arrest, handcuffed him, took him out in the other room (R. p. 80) and proceeded to search the apartment. They found exhibit 2, being the narcotics mentioned in the indictment (R. p. 149). The search lasted approximately 20 minutes (R. p. 82). All officers participated in the search, the two remaining below being summoned immediately after the arrest (R. p. 80).

The three police cars were arranged as illustrated in defendant's exhibit A2 (R. p. 100) in a manner to attract little attention and insure easy exit from the scene.

The officers did not smell opium prior to entering the apartment (R. p. 83).

The defendant Ruis Parker was a resident in the particular apartment for 9 years last prior to the arrest.

We have been unable to find, in a survey of the reported decisions, a case where police officers have acted with less evidence to justify the arrest and entry of the premises, a search and seizure, as in the case at bar. The closest case on the facts appears to be *United*

States vs. Clark, D. C. Mo. 1939, 29 F. Sup. 139. In that case, to justify the arrest, 1, the agent who arrested the defendant had seen her enter and leave a grocery store known to him to be a place where there had been traffic in narcotics; 2, the agent knew the defendant was an addict; 3, immediately before the arrest, the defendant's companion, an informer, known by the agents to be reliable, indicated to them that the defendant had narcotics. Under this factual situation, the Court said:

> "It seems that the Fourth Amendment to the Constitution is whittled away to nothingness if it held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever, and there was none here, that the informer's information was itself more than mere guesswork and speculation."

> "We must now confess that we now draw back a little when we hear asserted a claim of constitutional right in a criminal case. Almost always as it is in this instance, it is advanced to shield an individual who is guilty from the justice of the law he has flouted. The only satisfaction we can derive from maintaining the constitutional rights of such a person arises from the knowledge that the obligation of the judicial oath requires it and from the certainty that only so may the protection of the Constitution be preserved against the day when innocent men will need it as a defense from governmental tyranny."

> "Motion to suppress evidence granted."

In *Kroska vs. United States*, CCA, 1931, 51 Fed. 2d, 330, the defendant was arrested by Federal agents who observed his automobile drive into his yard. They drove in behind it and observed the doors closed, the motor not running, no one in it and the rear deck open a few inches. They could see a keg in the rear compartment. The agent then entered the grade basement door of the house, found the defendant and placed him under arrest. In the yard before entering, they noticed a strong smell of moonshine. Neither of the officers saw defendant until Rhoades arrested him in the house.

> "The prohibition officers had neither a search warrant nor a warrant for the arrest of defendant. It is quite generally held that where a defendant is lawfully placed under arrest, then as an incident to such arrest he may be searched, as many also the place of his arrest. Here, however, with no previous knowledge of the facts or circumstances warranting even a suspicion that defendant was guilty of violating the National Prohibition Act, or that his automobile had been illegally transporting liquor, the officers entered his private premises. One of them, uninvited, entered his home, and finding him upstairs arrested him. The premises entered constitute the curtilage of defendant's home . . . It cannot well be claimed that this was a lawful arrest; in fact, it was flagrantly lawless so far as appears from the record, and the only facts or circumstances known by the officers which might lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile were such as were obtained by them by reason of their lawless invasion of the premises constituting the curtilage of defendant's home. In other words, they were wrongfully upon the premises of defendant and were wrongfully searching

his possessions at the very time they looked into the rear deck of the Oldsmobile coupe and obtained the information upon which the Government seeks to justify the search and seizure. This Court, in *Day v. United States, supra*, in an opinion by Judge Kenyon, said:

" 'Probable or reasonable cause is a belief fairly arising out of facts and circumstances known to the officer that a party is engaged in the commission of a crime.'

"The Supreme Court, in *Byars v. United States*, 273, S. 28, 47 S Ct. 248, 71 L. Ed. 520, said:

" 'Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challange has been interposed.'

"In *Go Bart Importing Co. v. United States*, 228 U. S. 344, 75 L. Ed. 375, in an opinion by Mr. Justice Butler, it is said:

" 'The first clause of the Fourth Amendment declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." —*Article IV, Amendments, Constitution of the United States.* It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent and unquestionably extends to the premises where the search was made and the papers taken.' "

In the case at bar, the officers saw nothing, had no reason to believe that narcotics were in the premises and acted only on the tip of an unknown informer, speaking over the telephone.

The facts in *Hernandez v. United States* C.C.A. 9th, 1927, are stated in the following excerpt, 17 Fed. 2d, 373:

> "Upon the writ of error the single question is presented whether the evidence obtained upon the search of the person of the defendant should have been excluded, timely application having been made for its return. The defendant was arrested without a warrant. Federal narcotic agents were watching a house at which it was believed narcotics had been sold. They saw the defendant coming from the rear of the house, accompanied by a women, who was a narcotic peddler and saw them proceeding down the street looking around in different directions "in a rather suspicious way." They arrested both the defendant and the woman. They found no narcotics on the woman, but in searching the defendant they found morphine in his overcoat pocket. The admissibility of evidence so obtained depends upon the question whether there was probable cause for the arrest. The generally accepted rule is thus expressed in 2 R.C.A. 451: 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' The officers who made the arrest knew nothing whatever of the defendant or his prior conduct. The fact that he was seen coming from a suspected house in company with a suspected woman, and that he and the woman were walking down the street looking around in what the officers thought was a suspicious man-

ner, whatever that may have meant, constitutes all of the evidence of probable cause. It falls far short, we think, of presenting reasonable grounds of suspicious supported by facts which would warrant a cautious man in believing that the defendant had committed a felony. At most, the circumstances were sufficient to create only a suspicion and suspicious circumstances, it has been repeatedly held, do not constitute probable cause. It is true that the defendant was arrested in the commission of a felony, as was subsequently developed, but the officers were not appraised of that fact by their senses or otherwise, and they had no reasonable ground to believe it. *Brown v. United States* C.C.C. 4 F. 2d, 246. Judgment reversed and cause remanded."

In the case at bar the officers acted solely on an anonymous telephone call.

In *Poldo v. United States,* C.C.A. 9th, 1932, 55 Fed. 2d, 866, the officers, sometime earlier, saw the defendant carrying what appeared to be a metal disc with a piece of tin around it "such as is used in making the reeding or knurled edge on counterfeit silver dollars." He was followed to a garage built in a dwelling house and was observed to enter with the articles mentioned. Two weeks later on an affidavit which ommitted the time and day of the existence of the grounds for the search and consequently was defective for that reason, the warrant for search was issued and the garage was searched. Not finding anything in the garage, the search continued to his private dwelling, it not appearing that any doors were physically broken, a plaster cast was found and the defendant arrested.

"In *Stacey v. Emery*, 97 C.S. 642, 645, 24 L. Ed. 1035, the Supreme Court thus defined probable cause: 'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.' See also other cases quoted or cited in *Carroll v. United States*, 267 U. S. 161, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790."

"And as pointed out in *Lawson, et al, v. United States, Supra*: *The probable cause must be determined by the existence of facts known to the officer before, not after, the search.*"

"Though in *these cases seizures without search warrants, and not arrests, were involved, the doctrine is identical.* In *Baumboy v. United States*, C.C.A. 24 F. 2d, 512, however, both arrest and seizures were considered by this court. Judge Dietrich saying 'For defendant in error it is urged that the seizure may be justified as an incident of the arrest, but the arrest was to say the least no more defensible than the search.'

"To justify the search of a man's home as an incident to an arrest made upon a cause so lacking in probability would, we believe, result in at least a partial nullification of the Fourth Amendment. Such an arrest would not be in keeping with the letter or the spirit of the amendment or of the Supreme Court decisions interpreting it." Judgment reversed.

Where prohibition agents forced entrance into a building in which they believed, principally from their sense of smell, that an illicit still was in operation, and arrested those who were operatng the place on the theory that a crime was being committed in the officers' presence, the Court, in *United States v. Hirsch*,

1932, D. C. 57, F. 2d, 555, while recognizing the rule that a search may be made as an incident of a lawful arrest, stated that the cases cited in support of that proposition had no application since, in this instance the forced entry into the building constituted a search which preceded the arrest, and that to come within the theory of the cases referred to, the arrest must precede the search. It was held that the evidence did not justify the officers' conduct in this instance. See Annotation 82 A.L.R. 782.

Two recent decisions of the Supreme Court bear study in connection with the case at bar. The first is *Harris v. United States*, 1947, 67 S. Ct. 1098. In this case officers, under authority of a warrant charging violation of a mail fraud statute and a warrant charging transportation of a forged check in violation of the Stolen Property Act, arrested defendant in the living room of his four room apartment and while making incidental search, discovered forged draft cards in a bureau drawer. In a prosecution for violation of Selective Service Act by concealing and altering draft cards, the majority of the court held that the record sustained findings that the officers conducted search in good faith for the purpose of discovering stolen checks, and that evidence of a separate crime could be used.

Even in such a case where the officers had entered the premises and were making a valid search thereof

pursuant to a valid arrest following a valid warrant for arrest, it is significant that four members of the Supreme Court dissented in a most analytical and comprehensive analysis of the law relating to unlawful searches. Their comment here is significant inasmuch as later in 1947 a case directly in point was decided in which the dissenting judges wrote the majority opinion—*Anne Johnson vs. United States*, 333 U. S. 10-17, an appeal through this Circuit Court from the District Court of the forum of the case at bar.

Judge Frankfurter, in dissent in the Harris case, after considering the history of the statute and observing that "historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American Independence."

"The plain import of this is that searches are 'unreasonable' unless authorized by a warrant and a warrant hedged about by adequate safeguards. 'Unreasonable' is not to be determined with reference to a particular search and seizure considered in isolation. The 'reason' by which search and seizure is to be tested is the 'reason' that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant."

"Much is made of the fact that the entry into the house was lawful. But we are not confined to issues of trespass. The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry."

Justice Murphy criticized the case as restoring the general search warrant, lacking all constitutional safeguards, and offered a scholarly summary of the court's decisions strictly limiting the authority of officers to search incidental to a valid arrest.

Justice Jackson, following the dissents, observed:

> "The amendment, having thus roughly indicated the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistent with the right so declared, to make searches." . . . . "and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." Here endeth the command of the forefathers, apparently because they believed that by thus controlling search warrants they had controlled searches. The forefathers, however, were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one."
>
> "In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of the individual life. In view of the readiness of zealots to ride roughshod over claims

of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would not seem that they should be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.

"Of course, this, like each of our constitutional guarantees, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers, and effects which is indispensable to individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught."

The above comments, as observed, are significant inasmuch as the dissent judges the same year wrote the majority opinion on the Anne Johnson case. There the arrest was made in a hotel room in Seattle by officers acting on a tip from a confidential informer, known to them, who was also a known narcotic user. The informer was taken to the hotel to interview the manager, and he returned saying he could smell burning opium, and between 8:30 and 9:00 o'clock returned to the hotel with agents who smelled the opium.

"The government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room

and found her to be the sole occupant. It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den' and it says . . . "that when the agents were admitted into the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotics. Thus the government quite properly takes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of their entry of her home. *It was therefore their observations inside of her quarters, after they had obtained admission, under color of their police authority, on which they made the arrest.*"

"*Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest.* This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies, must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects" and would obliterate one of the most fundamental distinctions between our form of government where officers are under the law and the police-state where they are the law."

Reversed.

CONCLUSION

The foregoing discussion is based on the testimony of the prosecution witnesses, mainly the testimony of the arresting officers. It can again be observed that on a review of the reported cases it appears that no thinner justification for an arrest, an entry into a private dwelling, a search and a seizure without warrant, has ever been submitted to a Court of record. A review of the evidence in its entirety makes the story of the police officers incredible and takes the substance from the thin thread of reasonableness that has been submitted.

The uncorroborated testimony of one police officer —Capt. Morris, that an unknown voice states that a theretofore unknown man is in need of police help— not the help of a doctor or an ambulance and none is called (R. p. 92), but the help of the police department, felony detail. Capt. Morris does not call a local prowler car or refer the matter to the policeman on the beat; this, according to him is something that demands the attention of headquarters.

Then, by sheer coincidence and happenstance, an entire felony squad of five officers are ready to go out on another call and it just happens that 12th and Yesler is en route. Three cars were used—not at all for the reason that one or two of the cars might run into trouble at the address because no one has any

reason to expect trouble or to think other than a man is in need of humanitarian assistance.

Capt. Morris arrives first—in his mind is only that a man is dying, possibly poisoned, "in a bad way." Does he run up to the apartment? No, he waits for the next car and when it arrives the three officers wait five or more minutes for the third car with the other officers. Without any premeditation or design, the cars are brought in in a manner to attract the least attention and to insure a quick retreat—only out of habit in police work.

Every disinterested witness and the defendant testified that the street door to the building was always locked: An attorney who owned the fee title to the property (R. p. 152), the owner-manager (R. p. 179), another tenant (R. p. 174), and the defendant (R. p. 186). But by bald chance at the time Capt. Morris and his men tried the door it was closed but not locked and they entered leaving two officers outside even though it appears that it was raining. The door to defendant's apartment is ajar—an invitation for the officers to enter. At this time Capt. Morris feels the length to which this happy chain of events has stretched and he becomes somewhat apprehensive. He does not think that he is going to make an arrest and search the premises and seize contraband property—he is thinking only of the man in distress, but he nevertheless

calls out. He says he does this because he does not want to get shot at. Why should anyone shoot at a man on an errand of mercy? Behind a closed door he discovers the defendant, groggy, but cooperative and the defendant points to exhibit 1 and says "there it is." They handcuff him for some reason, and search and find exhibit 2.

In truth, regardless of their testimony as to their intention and the working of their minds, the police officers in this case followed typical raid procedures. Their actions bely their claimed intentions.

We respectfully submit that the above testimony of the police officers as to their state of mind in making the entry, arrest, search and seizure is meant for gullible minds—that it is beyond reasonable belief.

At best, given full credence, the testimony falls far short of tests of reasonableness established by the decisions of all United States Courts—in determining whether an arrest, search and seizure is reasonable under the terms of the Fourth Amendment to the Federal Constitution. On analysis, the testimony appears to be a mere sham.

In closing, let us observe this: If an entry into a private residence, an arrest, a search and a seizure can be justified by the uncorroberated testimony of an arresting officer of a telephone call from an unknown

informer—if that amount to reasonableness, the guarantees of the Fourth Amendment against unreasonable searches and seizures is without meaning. We respectfully petition that the judgment of the District Court be reversed.

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